FILED
MAY 22 2003
OFFICE OF THE CLERK

No. 02-1574

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner,*
v.
MICHAEL A. NEWDOW, ET AL., *Respondents.*

On Petition for A Writ of Certiorari to the
United States Court of Appeals for Ninth Circuit

Brief Amici Curiae of United States Senators Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham, United States Representatives Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller, C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., the American Center for Law and Justice, and One Hundred Fifty-Six Thousand Five Hundred and Ninety-Seven American Citizens Supporting Petitioner

JAY A. SEKULOW
Counsel of Record
COLBY M. MAY
JAMES M. HENDERSON
STUART J. ROTH
JOEL H. THORNTON
JOHN P. TUSKEY
LAURA B. HERNANDEZ

AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street SE
Washington, D.C. 20003
(202) 546-8890

Attorneys for Amicus Curiae

17 pp

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii
INTEREST OF AMICI 1
REASONS FOR GRANTING THE WRIT 2

I. Certiorari Should Be Granted Because This Case Presents a Constitutional Question of Exceptional Importance 2

II. Certiorari Should Be Granted Because The Ninth Circuit's Decision Is Irreconcilable With Everything This Court Has Ever Said About The Pledge of Allegiance 6

III. This Court Should Grant Review To Resolve The Split In The Circuits Created By The Ninth Circuit's Decision 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Allegheny County v. Am. Civil Liberties Union, 492 U.S. 573 (1989) 11, 12
Bauchman v. W. High Sch., 132 F.3d 542 (10th Cir. 1997) 13
Bd. of Educ. v. Barnette, 319 U.S. 634 (1943) 4
Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) 13
Engel v. Vitale, 370 U.S. 421 (1962) 6, 7
Lee v. Weisman, 505 U.S. 577 (1992) 6, 8, 9
Lynch v. Donnelly, 465 U.S. 668 (1984) 10, 11
Newdow v. United States Congress, 321 F.3d 772 (9th Cir. 2003) 4
Newdow v. United States Congress, No. 00-16423, 2002 U.S. App. Lexis 28040 (9th Cir. June 26, 2002) 5, 6, 7
Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) 7, 8
Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992) 13
Wallace v. Jaffree, 472 U.S. 38 (1985) 11
Walz v. Tax Comm'n of New York City, 397 U.S. 664 (1970) 12
Zorach v. Clausen, 343 U.S. 306 (1952) 4

STATUTES

31 U.S.C. § 5112(d)(1) 10
36 U.S.C. § 186 10

INTEREST OF AMICI*

Amici, Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham are members of the United States Senate, and Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., are members of the United States House of Representatives currently serving in the One Hundred Eighth Congress.

Amicus, American Center for Law and Justice (ACLJ), is a public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of Record for the ACLJ has presented oral argument in eight cases before this Court. ACLJ attorneys have also participated as amicus curiae in numerous cases before this Court and the lower federal courts.

Amici, 156,597 Americans, are citizens who represent all fifty states. These amici include school-age children, many of whom attend public schools, and desire to recite the Pledge of Allegiance in its entirety.

---

* This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation of submission of this brief.

Amici urge this Court to grant certiorari in this case because they are convinced that the Ninth Circuit's decision holding the phrase "under God" in the Pledge of Allegiance unconstitutional is profoundly wrong. Recitation of the Pledge of Allegiance in public schools is fully consistent with the Establishment Clause of the First Amendment to the United States Constitution. The words of the Pledge echo the conviction held by the Founders of this Nation that our freedoms come from God. Congress placed the phrase "One Nation Under God" in the Pledge of Allegiance for the express purpose of reaffirming America's unique understanding of this truth, and to distinguish America from atheistic nations who recognize no higher authority than the State. The First Amendment affords atheists complete freedom to disbelieve; it does not compel the federal judiciary to redact religious references in patriotic exercises in order to suit atheistic sensibilities.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because This Case Presents a Constitutional Question of Exceptional Importance.

The magnitude of the question presented in this case can hardly be overstated. Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in the voluntary recitation of the Pledge of Allegiance, far more is at stake. The Ninth Circuit's decision renders constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

The first casualty of the Ninth Circuit's decision will be the practice of requiring students to learn and recite passages from many historical documents reflecting the

Nation's religious heritage and character. If a public school district violates the Establishment Clause by requiring students to recite the Pledge of Allegiance, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact,[1] the Declaration of Independence,[2] and the Gettysburg Address[3]

---

[1]The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually *in the presence of God*, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

Mayflower Compact, *available at* http://www.project 21.org/MayflowerCompact.html (emphasis added).

[2] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaraction of Independence* para. 2 (U.S. 1776). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and "*Nature's God*." *Id.* para. 1. The founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[] to the *Supreme Judge of the world* to rectify their intentions." *Id.* para. 32.

[3]On November 19, 1863, President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom--and that Government of

all contain religious references substantiating the fact that Americans are a predominantly "religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). *See also Newdow v. United States Congress*, 321 F.3d 772, 778 (9th Cir. 2003) (O'Scannlain, J., Kleinfeld, J., Gould, J., Tallman, J., Rawlinson, J., and Clifton, J., dissenting from denial of rehearing en banc). Indeed, the references to deity in these historical documents are presumably even more problematic according to the Ninth Circuit's reasoning because they proclaim not only God's existence but specific dogma about God – He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge of Allegiance, *see Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that the Ninth Circuit's decision will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Students might learn about the Nation's founding documents without being required to recite them. Public school music programs cannot exist, however, without student performance. Thus, patriotic anthems, such as "*America the Beautiful*" and "*God Bless America,*" will become taboo because they cannot realistically be learned unless they are sung. Such musical treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally

---

the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

suspect, at least as a part of public school music curricula. According to the Ninth Circuit's logic, if a group of students sing "*God Bless America,*" the Establishment Clause is violated because an atheistic student might *feel coerced* to sing along (and indeed may well be coerced inasmuch as music teachers are not constitutionally compelled to exempt students from singing with the class).

The Ninth Circuit's effort to distinguish the Pledge of Allegiance from religious references in historical documents and music fails. The court reasoned that the Pledge of Allegiance is "performative," whereas the Declaration of Independence and patriotic music are not. *Newdow v. United States Congress*, No. 00-16423, 2002 U.S. App. Lexis 28040, at *23 (9th Cir. June 26, 2002). The court's logic ignores completely the fact that students may refuse to "perform" the Pledge of Allegiance but they do not have the same constitutional right to refuse to sing "*America the Beautiful*" in music class. Worse, however, is the court's implicit assumption that when students recite the Pledge of Allegiance, they mean what they say, but when they sing patriotic music or recite historical documents, they are merely mouthing words without mental affirmation of the contents. *Id.* According to the Ninth Circuit then, constitutional violations hinge on the subjective mental state of the student speakers or singers.

Undoubtedly, teachers who take seriously their responsibility for inculcating the civic values enshrined in the Nation's foundational documents would be dismayed to learn that the Constitution now compels them to ensure that students who recite passages from these documents do not actually believe in the values reflected, lest some objecting student feel mentally coerced. Similarly, the Ninth Circuit's logic would impel public school music directors to ensure that members of the school chorale do not actually agree

with the words of Bach's "*Jesu, Joy of Man's Desiring,*" lest a Hindu soprano be offended.

If allowed to stand, the Ninth Circuit's decision will threaten a sort of Orwellian reformation of public school curricula by censoring American history and excluding much that is valuable in the world of choral music.

II. Certiorari Should Be Granted Because The Ninth Circuit's Decision Is Irreconcilable With What This Court Has Said About The Pledge Of Allegiance.

Although purporting to give "due deference," *Newdow*, 2002 U.S. App. Lexis 28040, at *22, to this Court's numerous statements about the constitutionality of the Pledge of Allegiance, the Ninth Circuit's decision is patently inconsistent with those statements. In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge of Allegiance, they have concluded unequivocally that those references pose no Establishment Clause problems. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

The Ninth Circuit's analysis was flawed from the start. Claiming reliance on this Court's school prayer cases, including *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit lumped together for constitutional analysis religious exercises and patriotic exercises. In every school prayer case, however, this Court consistently has distinguished between religious exercises, such as prayer and Bible

reading, and patriotic exercises with religious references. In *Engel v. Vitale*, 370 U.S. 421 (1962), which struck down New York State's law requiring school officials to open the school day with prayer, the Court explained:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.

Id. at 435, n.21.

Just one year later, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great

> consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. at 308 (Goldberg, J., concurring).

Justice Brennan expressly opined in *Schempp* that "reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id.* at 304 (Brennan, J., concurring).

In *Lee v. Weisman,* 505 U.S. 577 (1992), a decision built in large part on *Engel*, *see* 505 U.S. at 590, 592, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious*

> *exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.*

Id. (citations omitted) (emphasis added).

As in *Engel* and *Schempp,* the deciding factor in *Lee* was that school officials sponsored a religious exercise – prayer. *Lee* gives no support to the Ninth Circuit's conclusion that the voluntary recitation of the Pledge of Allegiance violates the Establishment Clause because it contains the phrase "One Nation Under God." The Ninth Circuit's ruling that voluntary patriotic exercises are

converted into religious exercises if they contain religious references flatly contradicts the Court's assurances to the contrary in *Engel*, *Schempp*, and *Lee*. By ignoring the Court's consistent distinction between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not, the Ninth Circuit misapplied *Lee*.

In addition to misreading the Court's school prayer cases, the Ninth Circuit also refused to heed the unequivocal import of Supreme Court statements addressing the Pledge of Allegiance in other contexts. Every time the Court or an individual Justice has mentioned the Pledge of Allegiance, whether in majority, concurring, or dissenting opinions, the conclusion has been that it poses no Establishment Clause problems.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." 465 U.S. at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "government's acknowledgment of our religious heritage," and included among those examples Congress' addition of the words "under God" in the Pledge of Allegiance in 1954. *Id.* at 676-77.

> [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 5112(d)(1) (1982 ed.), and in the language "one nation under god," as part of the Pledge

> of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year.

Id. at 676-77.

In a concurring opinion, Justice O'Connor stated that governmental acknowledgements of religion such as the National Motto "In God We Trust" "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id.* at 693 (O'Connor, J., concurring).

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated explicitly that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purpose of solemnizing public occasions, and expressing confidence in the future.'" 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693) (O'Connor, J., concurring)).

In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), Justices Blackmun, Marshall, Brennan and Stevens stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of 'ceremonial deism,'. . . because there is an obvious distinction

> between creche displays and references to God in the motto and the pledge.

492 U.S. at 602-603.

The three dissenting Justices in *Allegheny*, Justices Kennedy, Rehnquist and Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. The dissent pointed out that the Establishment Clause does not

> require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

Id. at 657 (Kennedy, J., concurring) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

In sum, every Member of the current Court that has expressed any opinion about the constitutionality of the Pledge of Allegiance has stated that it poses no Establishment Clause problems. The Ninth Circuit's insistence, therefore, that the Pledge of Allegiance becomes unconstitutional when school children recite it is insupportable.

III. This Court Should Grant Review To Resolve The Split In The Circuits Created By The Ninth Circuit's Decision.

In *Sherman v. Community Consolidated School District*, 980 F.2d 437 (7th Cir. 1992), the Seventh Circuit rejected an Establishment Clause challenge to a public school's policy of having school children recite the Pledge of Allegiance. Unlike the Ninth Circuit, the court acknowledged its responsibility to follow the Supreme Court's clear direction: "[i]f the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." 980 F.2d at 448.

Additionally, the Ninth Circuit's decision conflicts in principle with the decisions of two other Courts of Appeal holding that the performance of religious music by public school students is consistent with the Establishment Clause. *See Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (Establishment Clause did not forbid school choir from using a religious piece as its theme song).

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record

COLBY M. MAY
STUART J. ROTH
JAMES M. HENDERSON
JOEL H. THORNTON
JOHN P. TUSKEY
LAURA B. HERNANDEZ

AMERICAN CENTER FOR
LAW & JUSTICE
205 Third Street SE
Washington, DC 20003
(202) 546-8890

Attorneys for Amici Curiae

AMICUS CURIAE

BRIEF

(4) (3)

Nos. 02-1574 & 02-1624

Supreme Court, U.S.
FILED
MAY 22 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,
v.
MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS,
v.
MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel,
Office of Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435
Counsel for United States Senate.

MAY 2003.

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Summary of Argument	2
Argument:	3
I. Review Is Warranted Because the Pledge's Acknowledgment of the Historical Role of Religion Does Not Violate the Establishment Clause	3
A. The Pledge Is a Patriotic Exercise That Acknowledges the Historical Role of Religion in America	3
B. The Pledge Does Not Violate the Establishment Clause	9
II. Review Is Further Warranted Because the Decision Below Conflicts With the Decision of Another Circuit on an Issue of Exceptional Importance	13
Conclusion	14

Page

TABLE OF AUTHORITIES

Cases:

American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289 (6th Cir. 2001) 13
Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) 12
County of Allegheny v. ACLU, 492 U.S. 573 (1989) 7, 11, 12
Engel v. Vitale, 370 U.S. 421 (1962) 6, 7, 8, 9, 10, 11
Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981) 13
Lee v. Weisman, 505 U.S. 577 (1992) 10, 11, 12
Lemon v. Kurtzman, 403 U.S. 602 (1971) 11-12
Lewis v. Allen, 159 N.Y.S.2d 807 (N.Y. Sup. Ct. 1957), *aff'd*, 207 N.Y.S.2d 862 (3d Dept. 1960), *aff'd*, 14 N.Y.2d 867 (N.Y.), *cert. denied*, 379 U.S. 923 (1964) 13
Lynch v. Donnelly, 465 U.S. 668 (1984) 5, 6, 7, 10, 11
Marsh v. Chambers, 463 U.S. 783 (1983) 6
Murray v. City of Austin, Texas, 947 F.2d 147 (5th Cir. 1991) 13
Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), *aff'd*, No. 99-4136 (11th Cir. Jan. 4, 2000) 13
Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) 10
School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) 4, 8, 9, 10, 11
Sherman v. Community Consolidated Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) 2, 12, 13
Smith v. Denny, 280 F. Supp. 651 (E.D. Cal. 1968), *appeal dismissed*, 417 F.2d 614 (9th Cir. 1969) 13
United States v. Nixon, 418 U.S. 683 (1974) 5
Wallace v. Jaffree, 472 U.S. 38 (1985) 10, 11
Zorach v. Clauson, 343 U.S. 306 (1952) 10

Constitution and Statutes:

U.S. Const. art. VII 6, 9
U.S. Const. amend. I 9
Pub. L. No. 623, ch. 435, 56 Stat. 380 (1942) 4
Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954) 4
Pub. L. No. 107-293, 116 Stat. 2057 (2002) 2, 6, 7
1 U.S.C. XLIII (2000) 9

Page

Constitution and Statutes—Continued
2 U.S.C. § 288e(a) (2000) 2
2 U.S.C. § 288e(c) (2000) 2
2 U.S.C. § 288*l*(a) (2000) 2
4 U.S.C.A. § 4 (West Supp. 2003) 2, 6, 7
31 U.S.C. § 5112(d)(1) (2000) 8
31 U.S.C. § 5114(b) (2000) 8
36 U.S.C. § 301 (2000) 8
36 U.S.C. § 302 (2000) 8

Congressional Materials:

S. Res. 292, 107th Cong. (2002), 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002) 1
S. Res. 71, 108th Cong. (2003), 149 Cong. Rec. S3204 (daily ed. Mar. 5, 2003) 2
S. Rep. No. 77-1477 (1942) 4
S. Rep. No. 83-1287 (1954) 4, 5, 7, 8
H.R. Rep. No. 77-2047 (1942) 4
H.R. Rep. No. 83-1693, *reprinted in* 1954 U.S.C.C.A.N. 2340 ..... 5, 8
Senate Rule IV.1(a), *Standing Rules of the Senate*, S. Doc. No. 107-1 (2002) 7
House Rule XIV.1, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 106-320 (2001) 7
S. Doc. No. 82-20 (1951) 7

Miscellaneous:

John W. Baer, *The Pledge of Allegiance: A Centennial History 1892-1992* (1992) 3, 4
John Y. Cole, *On These Walls* (1995) 7
1 Max Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1966) 6
http://www.mdw.army.mil/FS-A04.htm 7
http://www.monticello.org/reports/quotes/memorial.html 7-8
http://www.nps.gov/linc/memorial/inscript.htm 8
http://www.supremecourtus.gov/about/north&southwalls.pdf 7

In the Supreme Court of the United States

Nos. 02-1574 & 02-1624

UNITED STATES OF AMERICA, PETITIONER,
v.
MICHAEL A. NEWDOW, ET AL., RESPONDENTS

ELK GROVE UNIFIED SCHOOL DISTRICT, AND DAVID W. GORDON, SUPERINTENDENT, EGUSD, PETITIONERS,
v.
MICHAEL A. NEWDOW, RESPONDENT

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS

This case presents the question whether a school district's policy of teacher-led, voluntary recitation of the Pledge of Allegiance to the Flag violates the Establishment Clause of the First Amendment to the Constitution. Within hours of the Ninth Circuit's invalidation of the policy at issue, the Senate, by a vote of 99-0, reaffirmed its conviction that the Pledge, which has been codified in its present form since 1954, "is not an unconstitutional expression of patriotism." S. Res. 292, 107th Cong. (2002), 148 Cong. Rec. S6105-06 (daily ed. June 26, 2002). Relying upon the many public acknowledgments of our religious heritage, Congress subsequently reenacted the

Pledge in its identical language, Pub. L. No. 107-293, § 2(a), 116 Stat. 2057, 2060 (2002), 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes), and reaffirmed its belief that the reference to God in the Pledge is "clearly consistent with the text and intent of the Constitution." *Id.*, § 1(9). The United States Senate, therefore, has a strong interest in the proper disposition of this case and appears as amicus curiae to present its view that the Pledge fully comports with the commands of the Constitution.[1]

SUMMARY OF ARGUMENT

For 111 years, our Nation's public schools have instilled the virtue of patriotism in our children through daily recitation of the Pledge of Allegiance to the Flag. The divided decision below wrongly bans that practice in the nine Western states. Review of that decision by this Court is warranted because it is contrary to the unbroken tradition of public acknowledgments of the role of religion in our Nation's history and because it misunderstands the constitutional distinction between patriotism and prayer in public school. The guidance of this Court is further needed because the decision below squarely conflicts with the decision of the Seventh Circuit in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), and invalidates the recitation of a patriotic creed codified, and recently reaffirmed, by Acts of Congress.

---

[1] This appearance as amicus is pursuant to 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *See* S. Res. 71, 108th Cong. (2003), 149 Cong. Rec. S3204 (daily ed. Mar. 5, 2003) (directing Senate appearance in this Court.) Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). Pursuant to 2 U.S.C. § 288e(c), this submission presents a constitutional defense of the Pledge of Allegiance.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE PLEDGE'S ACKNOWLEDGMENT OF THE HISTORICAL ROLE OF RELIGION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Review is warranted because the two-judge majority below wrongly invalidated as a "religious act" the voluntary recitation of the Pledge of Allegiance in public school. Appendix to United States Petition for a Writ of Certiorari (hereinafter "U.S. Pet. App.") at 17a. America's National Pledge is our most widely recognized statement of patriotism, unity, and devotion to country. It is recited literally millions of times each day in our schools. Because the voluntary recitation of the Pledge is a patriotic practice that acknowledges the historical role of religion in America, it does not violate the Establishment Clause of the First Amendment to the Constitution.

A. The Pledge Is a Patriotic Exercise That Acknowledges the Historical Role of Religion in America

The Pledge is a constitutional expression of patriotism that recognizes the role of religion in our Nation's history. It was originally written by Francis Bellamy in 1892 in connection with a national public school celebration of the 400th anniversary of the discovery of America. John W. Baer, *The Pledge of Allegiance: A Centennial History 1892-1992*, at 1-2 (1992). In its original form, the Pledge read: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." *Id.* at 3.

The Pledge, Bellamy explained, was inspired by themes of unity and patriotism arising out of the Civil War and the founding of our country. A "pledge" of "allegiance" recalled the vows of allegiance recommended by President Lincoln during the Civil War; "and the Republic for which it stands" was a phrase popularized in the 1850's by Senator Daniel Webster; "one nation, indivisible" represented "our struggle for independence and for Indivisibility"; and

"with Liberty and Justice for all" encompassed our basic national ideals. *Id.* at 4, 47-48.

In the 1920's, the words "to my flag and the Republic" were replaced with "to the flag of the United States of America and to the Republic." *Id.* at 57-58. By that time, the Pledge had gained wide popular acceptance across America, fulfilling its author's vision that it become "a creed of unquestionable Americanism." *Id.* at 58-59.

During the Second World War, Congress codified the Pledge among other patriotic practices, *see* Pub. L. No. 623, ch. 435, § 7, 56 Stat. 380 (1942), in order to "emphasize the existing rules and customs pertaining to the display and use of the flag." S. Rep. No. 77-1477, at 1 (1942); H.R. Rep. No. 77-2047, at 1 (1942) (setting forth "uniform guide for the proper use and display of the flag"). Then, in the midst of the Cold War, harkening back to President Lincoln's concluding call in his Gettysburg Address — that "*this nation, under God*, shall have a new birth of freedom" — Congress added the words "under God" after "Nation" to the Pledge. Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954).

The legislative history of the 1954 enactment demonstrates that Congress added "under God" to the Pledge to "recognize the historical fact that our Nation was believed to have been founded 'under God.'" *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring). The Senate Report recommending adoption of the amendment stated that "[o]ur forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership." S. Rep. No. 83-1287, at 2 (1954). The House Report similarly asserted that:

> Our American Government is founded on the concept of individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with

> certain inalienable rights which no civil authority may usurp.

H.R. Rep. No. 83-1693, at 1-2, *reprinted in* 1954 U.S.C.C.A.N. 2340.

In explaining the amendment, the House Committee on the Judiciary observed that "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." *Id.* at 2. As manifestations of this historical tradition, both committees pointed to the Mayflower Compact, "America's first instrument of government," S. Rep. No. 83-1287, at 2, which "invoked the name of God in the first sentence," *id.*; *see also* H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2340, and the Declaration of Independence, which "no less than four times refer[red] to the existence of the Creator." *Id.*; *see also* S. Rep. No. 83-1287, at 2.

In accordance with the admonition that "each branch of the Government must initially interpret the Constitution" in the performance of its assigned constitutional duties, *United States v. Nixon*, 418 U.S. 683, 703 (1974), the committees of both Houses expressed their considered view that, within the meaning of this Court's precedents, the amendment was "not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3, 1954 U.S.C.C.A.N. at 2341; S. Rep. No. 83-1287, at 2. Nor did the amendment "violate the right of any person to disbelieve in God or reject the existence of God. The recognition of God in the pledge . . . does not compel any individual to make a positive affirmation in the existence of God in whom one does not believe." *Id.*

The founding documents cited by the committees contain only some of the many "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). At the inception of the Constitutional Convention, George Washington exhorted the delegates to "raise a

standard to which the wise and the honest can repair; the event," he declared, "is in the hand of God!" Pub. L. No. 107-293, § 1(4), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). Five weeks later, with Convention delegates "groping . . . in the dark to find political truth," Benjamin Franklin pondered "applying to the Father of lights to illuminate our understandings," famously recalling that, during the Revolutionary War, God had "heard, and . . . graciously answered" the "daily prayer in this room for the divine protection." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 451 (rev. ed. 1966). The product of the Convention, our Constitution, explicitly references the Deity. *See* U.S. Const. art. VII ("Year of our Lord").

The First Congress not only acknowledged a proper role for religion in public life, but it did so at the very time it drafted the Establishment Clause. Just three days before Congress sent the text of the First Amendment to the states for ratification, it authorized the appointment of legislative chaplains. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Also on that day the House of Representatives successfully urged President Washington to institutionalize the colonial practice, which continues to this date, of celebrating "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2; Pub. L. No. 107-293, § 1(6), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). On July 21, 1789, the very day that the First Congress approved the Establishment Clause, it passed the Northwest Ordinance, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Engel v. Vitale*, 370 U.S. 421, 443 n.9 (1962) (Douglas, J., concurring); Pub. L. No. 107-293, § 1(5), 116 Stat. 2057, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes).

The public manifestations of our Nation's religious heritage include "an unbroken history of official acknowledg-

ment by all three branches of government." *Lynch*, 465 U.S. at 674. Both Houses of Congress open their daily sessions with prayer and recitation of the Pledge. *See* Senate Rule IV.1(a), *Standing Rules of the Senate*, S. Doc. No. 107-1, at 4 (2002); House Rule XIV.1, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 106-320, at 620 (2001). "Since the days of John Marshall," this Court's crier has opened each day's session by calling out: "God save the United States and this Honorable Court." *Engel*, 370 U.S. at 446 (Stewart, J., dissenting). Every President has asked for divine guidance upon assuming office. *Id.* Upon the conclusion of speeches, including the constitutionally mandated State of the Union address, Presidents commonly ask for God's blessings upon America. S. Rep. No. 83-1287, at 2.

Manifestations of the religious faith of our forebears appear throughout the Nation's Capital. The Senate Chamber is inscribed with the words: "In God We Trust" and the Latin phrase "Annuit Coeptis" or "God has favored our undertakings." S. Doc. No. 82-20, at 27 (1951); Pub. L. No. 107-293, § 1(10), 116 Stat. 2058, 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). The Main Reading Room of the Library of Congress prominently displays the Biblical quotation: "The heavens declare the Glory of God, and the firmament showeth His handiwork" (Psalms 19:1). John Y. Cole, *On These Walls* 35 (1995). Friezes on the North and South walls of this Court's chamber depict a procession of historical lawgivers including Moses and Confucius. *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part); http://www.supremecourtus.gov/ about/ north&southwalls.pdf. The Tomb of the Unknown Soldier is engraved with the words: "Here rests in honored glory an American soldier known but to God." http:// www.mdw.army.mil/FS-A04.htm. Multiple references to God appear in inscriptions on our national memorials. *E.g.*, http://www.monticello.org/ reports/ quotes/ memo-

rial.html (Jefferson Memorial); http://www.nps.gov/linc/memorial/ inscript.htm (Lincoln Memorial).

Our National Motto and Anthem, like the Pledge, also manifest our religious origins. In approving the 1954 amendment to the Pledge, Congress recognized that, pursuant to an 1864 authorization, 31 U.S.C. §5112(d)(1), "In God We Trust" had been inscribed upon "billions and billions of coins." S. Rep. No. 83-1287, at 2; H.R. Rep. No. 83-1693, at 2, 1954 U.S.C.C.A.N at 2341. In 1955, Congress added that "avowal of faith," H.R. Rep. 83-1693, at 2, 1954 U.S.C.C.A.N. at 2341, to our paper currency, 31 U.S.C. §5114(b), and, one year later, declared it to be our National Motto. 36 U.S.C. §302; *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring). "The Star Spangled Banner," designated our National Anthem in 1931, 36 U.S.C. §301, also invokes the Almighty. *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring).

The Pledge is thus one of "countless . . . examples" of entirely legitimate official expressions in public life recognizing our religious heritage. *Id.* at 449-50 (Stewart, J., dissenting). Its recitation in school is no different from "the reading aloud of Lincoln's Gettysburg Address," *Abington*, 374 U.S. at 304 (Brennan, J., concurring), or the fact that "school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being." *Engel*, 370 U.S. at 435 n.21.[2] Given the pervasiveness of such references

---

[2] The panel majority below erroneously insists that reading aloud from the Declaration of Independence, or singing the National Anthem, is different from reciting the Pledge because the words "I pledge" render its recitation an affirmation of the speaker's faith, and not merely that of the author or composer at issue. *See* U.S. Pet. App. at 16a (claiming that "'I Pledge' is a performative statement.") The alleged distinction, however, has no foundation in Establishment Clause jurisprudence, and, in fact, does not exist. As Judge O'Scannlain noted in dissenting from the denial of rehearing en banc below, under the flawed reasoning of the panel majority, the Declaration of Independ-

to God in our founding documents, by our Framers, on our government buildings, by all three branches of government, and in our National Anthem and Motto, banning the recitation of the National Pledge in our public schools as a "religious act" "contradicts our 200-year history and tradition of patriotic references to God," U.S. Pet. App. at 81a (O'Scannlain, J., dissenting from denial of reh'g en banc).

B. The Pledge Does Not Violate the Establishment Clause

Our Pledge of Allegiance to the Flag does not even remotely approach the prohibition against an unconstitutional "establishment of religion." U.S. Const. amend. I. The panel majority's conclusion to the contrary reflects a fundamental misunderstanding of the constitutional distinction between prayer and patriotism in public school. That distinction, which is firmly entrenched in this Court's jurisprudence, leaves no doubt that public school children *may* recite the National Pledge for the same reason they *may* sing the National Anthem: such *patriotic* exercises are not *prayers*.

Over the past 40 years, every one of this Court's school prayer decisions has emphasized the fundamentally religious nature of the challenged activity. *See Engel*, 370 U.S. at 424-25, 435 n.21 (stating at outset that it was uncontested that "nature" of state-composed prayer at issue was a "religious activity" and "has always been religious"); *Abington*, 374 U.S. at 223-24 (stating that "pervading religious character" of reading Bible and reciting Lord's Prayer constitutes a "religious exercise"); *see also id.* at 266 ("The religious nature of the exercises here

---

ence and National Anthem "would seem to be the better candidate[s] for the chopping block than the Pledge" because they "require [the speaker] to acknowledge [a] *personal* relationship with God." *Id.* at 82a; *see* Declaration of Independence ("*We hold* these truths to be self-evident, that all men are . . . endowed by their Creator"), *reprinted at* 1 U.S.C. XLIII; Star Spangled Banner ("And this be *our* motto: In God is *our trust*"); *see also* U.S. Const. art. VII ("Year of *our Lord*"); America ("My Country 'Tis of Thee") ("Protect us by thy might, Great God, *our King*"!). (Emphases added.)

challenged seems plain.") (Brennan, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 58 (1985) (recognizing "wholly religious character" of Alabama statute motivated entirely by effort to advance prayer in public schools); *Lee v. Weisman*, 505 U.S. 577, 586-88, 598 (1992) (repeatedly describing graduation prayer as an "overt" "formal" and "explicit" "religious exercise"); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 305-07 (2000) (recognizing "religious content" of "religious messages" in prayers before high school football games).

But "*no court*, state or federal has *ever* held . . . that [this Court's] school prayer cases apply outside a context of state-sanctioned formal religious observances." U.S. Pet. App. at 78a-79a (O'Scannlain, J., dissenting from denial of reh'g en banc). To the contrary, this Court has repeatedly distinguished between lawful *patriotic* practices that acknowledge our religious heritage and unlawful *religious* practices that transgress the prohibition on governmental establishment of religion. In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), this Court rejected as "extreme" the condemnation of "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies," in upholding a program permitting students to absent themselves from public school in order to receive religious training. The Court reaffirmed the point in *Engel*, stating that the "unquestioned religious exercise" at issue in that case, a public school prayer "beg[ging] th[e] blessings of Almighty God," "*b[ore] no true resemblance*" to "patriotic or ceremonial occasions" referencing the Deity. 370 U.S. at 422, 435 n.21. (Emphasis added.)[3]

Likewise, in *Lynch*, 465 U.S. at 676, this Court identified the Pledge and Motto among examples of lawful

---

[3] Furthermore, in *Engel*, as well as in *Abington* and *Lee*, this Court struck down morning and graduation religious exercises without expressing any disapproval of the Pledge, which was also recited by students in all three cases, *Engel*, 370 U.S. at 438 (Douglas, J., concurring); *Abington*, 374 U.S. at 208; *Lee*, 505 U.S. at 583, and which individual Justices specifically distinguished. *See* note 4, *infra*.

"reference[s] to our religious heritage" guiding the conclusion that the nativity scene at issue was constitutionally permissible. And, most recently, in *County of Allegheny*, this Court noted the "obvious distinction" between the unconstitutional religious display in that case and the "references to God in the motto and the pledge." 492 U.S. at 603.[4]

Because of the substantial constitutional difference between prayer and patriotic references to God, voluntary recitation of the Pledge easily satisfies the tests used to identify Establishment Clause violations. The Pledge satisfies the *Lemon* test because it has the secular purposes of, *inter alia*, "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465

[4] The opinions explaining the views of 15 individual Justices in these cases also distinguish between unconstitutional religious practices and patriotic acknowledgments of our religious heritage. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) (recognizing longstanding acceptance of patriotic practices referencing God); *id.* at 449 (Stewart, J., dissenting) (same); *Abington*, 374 U.S. at 280-81, 301 (Brennan, J., concurring) (suggesting recitation of Pledge in lieu of prayer at issue and admonishing that "[a]ny attempt to impose rigid limits upon the mention of God . . . in the classroom would be fraught with dangers"); *id.* at 307-08 (Goldberg, J., concurring) (endorsing passage from Court's opinion in *Engel* distinguishing between patriotic invocations of God and "unquestioned religious exercise[s]"); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (endorsing various public references to God as "acknowledgments of religion"); *id.* at 716-17 (Brennan, J., dissenting) (identifying patriotic references to God as legitimate public "practices by which the government has long acknowledged religion"); *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (recognizing propriety of public acknowledgment of God); *id.* at 88 (Burger, C.J., dissenting) (same); *County of Allegheny*, 492 U.S. at 623, 625 (O'Connor, J., concurring) (referencing lawful purposes of "government recognition and acknowledgment of the role of religion in the lives of our citizens"); *id.* at 671-74 & n.10 (Kennedy, J., concurring in part and dissenting in part) (distinguishing patriotic references to God from unconstitutional religious practices); *Lee*, 505 U.S. at 639 (Scalia, J., dissenting) (noting that Court's invalidation of graduation prayer did not extend to practice of reciting Pledge during graduation ceremony).

U.S. at 693 (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); and neither advances religion nor fosters an excessive government entanglement with it. *Lemon*, 403 U.S. at 612-13; *see also* United States Petition for a Writ of Certiorari (hereinafter "U.S. Pet.") at 17-18. The Pledge satisfies the endorsement test because its acknowledgment of our religious heritage is "consistent with the proposition that government may not communicate an *endorsement of religious belief*." *County of Allegheny*, 492 U.S. at 602-03 (emphases added); *see also* U.S. Pet. at 16, 18, 20.

And the Pledge satisfies the coercion test because the voluntary observance of a patriotic practice does not "coerce" children to perform a "formal religious exercise." *Lee*, 505 U.S. at 587. *See* U.S. Pet. at 20, 21; U.S. Pet. App. at 85a. America's public schools "are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught." *Sherman*, 980 F.2d at 444. Indeed, the "diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons." *Id.*

But "offense alone" does not violate the Constitution. *Lee*, 505 U.S. at 597. "If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994). That, however, is what has occurred here. The objection of one non-custodial parent has "reduce[d] to silence" literally millions of school children "who *want* to pledge allegiance to the flag 'and to the Republic for which it stands.'" *Sherman*, 980 F.2d at 445.

Accordingly, certiorari should be granted to reaffirm the constitutional distinction between patriotism and

prayer and to restore the teacher-led, voluntary recitation of the Pledge in our Nation's public schools.

II. REVIEW IS FURTHER WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT ON AN ISSUE OF EXCEPTIONAL IMPORTANCE

Review is further warranted because the decision below directly conflicts with the Seventh Circuit's decision in *Sherman* and every other decision addressing the issue.[5] That court, reasoning that "under God" does not "make the Pledge a prayer," 980 F.2d at 445, upheld teacher-led, voluntary recitation of the Pledge in public school. Resolution of this square inter-circuit conflict, acknowledged by the court below, U.S. Pet. App. at 16a-17a, is thus needed to establish a uniform analysis of a national question upon which uniformity is required. We are "*one* nation," with one National Motto, one National Anthem, and, we submit, one National Pledge.

Finally, a definitive ruling on this issue by this Court is necessary because of the exceptional importance of the question presented. The decision below invalidates the teacher-led, voluntary recitation of a patriotic creed codified by an Act of Congress, *see* U.S. Pet. App. at 69a (O'Scannlain, J., dissenting from denial of reh'g en banc) (stating that panel's invalidation of Pledge "necessarily implies" that the 1954 Act is unconstitutional), and in-

---

[5] Two district courts, and one state court of last resort, have also rejected constitutional challenges to the voluntary recitation of the Pledge. *See Newdow v. United States*, No. 98-6585 (S.D. Fla. Dec. 1, 1998) (dismissing for lack of standing and on merits), *aff'd*, No. 99-4136 (11th Cir. Jan. 4, 2000) (affirming dismissal for lack of standing); *Smith v. Denny*, 280 F. Supp. 651, 653-54 (E.D. Cal. 1968) (dismissing on merits), *appeal dismissed*, 417 F.2d 614 (9th Cir. 1969); *Lewis v. Allen*, 159 N.Y.S.2d 807 (N.Y. Sup. Ct. 1957), *aff'd*, 207 N.Y.S.2d 862 (3d Dept. 1960), *aff'd*, 14 N.Y.2d 867 (N.Y.), *cert. denied*, 379 U.S. 923 (1964). Three circuits have concluded in dicta that the Pledge is constitutional. *See American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 301 n.10, 307 (6th Cir. 2001)(en banc); *Murray v. City of Austin, Texas*, 947 F.2d 147, 155 (5th Cir. 1991); *Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981).

vites further consideration of whether that law should be struck down on its face. *Id.* at 18a (remanding for consideration of declaratory relief "as to the constitutionality of the 1954 Act"). The importance of this constitutional question thus merits this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

PATRICIA MACK BRYAN,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
GRANT R. VINIK,
THOMAS E. CABALLERO,
Assistant Senate Legal Counsel.
Counsel for United States Senate.

MAY 2003.

○